

PETITION FOR WRIT OF HABEAS CORPUS: 28 USC §2254 (Rev. 10/99)

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
JAN 26 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON Division

MICHAEL N. MILBY, CLERK OF COURT

PETITION FOR A WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY

WESLEY EARL MASSOTH

PETITIONER

(Full name of Petitioner)

JAMES V. ALLRED UNIT

CURRENT PLACE OF CONFINEMENT

1176823

VS.

PRISONER ID NUMBER

BRAD LIVINGSTON

RESPONDENT

(Name of TDCJ Director, Warden, Jailor, or
authorized person having custody of petitioner)

CASE NUMBER

(Supplied by the Clerk of the District Court)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.
2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum.
3. When the Clerk of Court receives the \$5.00 filing fee, the Clerk will file your petition if it is in proper order.
4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-ID, you must send in a certified *In Forma Pauperis* Data Sheet from the institution in which you are confined. If you are in an institution other than TDCJ-ID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

5. Only judgments entered by one court may be challenged in a single petition. If you want to challenge judgments entered by different courts, either in the same state or in different states, you must file separate petitions as to each court.
 6. Include all your grounds for relief and all the facts that support each ground for relief in this petition.
 7. When you have finished filling out the petition, mail the original and two copies to the Clerk of the United States District Court for the federal district within which the State court was held which convicted and sentenced you, or to the federal district in which you are in custody. A "VENUE LIST," which lists U.S. District Courts in Texas, their divisions, and the addresses for the clerk's office for each division, is posted in your unit law library. You may use this list to decide where to mail your petition.
 8. Petitions that do not meet these instructions may be returned to you.
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PETITION

What are you challenging? (Check only one)

- ☒ A judgment of conviction or sentence, (Answer Questions 1-4, 5-12 & 20-23)
probation or deferred-adjudication probation
- ☐ A parole revocation proceeding. (Answer Questions 1-4, 13-14, & 20-23)
- ☐ A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-23)

All petitioners must answer questions 1-4:

1. Name and location of the court (district and county) which entered the conviction and sentence that you are presently serving or that is under attack:
208th District Court, Harris County, Texas
2. Date of judgment of conviction: May 16, 2003
3. Length of sentence: LIFE
4. Nature of offense and docket number (if known): Aggravated Sexual Assault
of a Child - NO. 917687

Judgment of Conviction or Sentence, Probation or Deferred-Adjudication Probation:

5. What was your plea? (Check one)
☒ Not Guilty ☐ Guilty ☐ Nolo contendere
6. Kind of trial: (Check one) ☒ Jury ☐ Judge Only

7. Did you testify at the trial? ☒ Yes ☐ No
8. Did you appeal the judgment of conviction? ☒ Yes ☐ No
9. If you did appeal, in what appellate court did you file your direct appeal?

14th District Court Cause Number (if known) 14-03-00606-CR

What was the result of your direct appeal (affirmed, modified or reversed): Affirmed

What was the date of that decision? June 22, 2004

If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

Result: Refused

Date of result: 1/25/2006 Cause Number (if known): PD-1645-05

If you filed a petition for *writ of certiorari* with the United States Supreme Court, answer the following:

Result: NA

Date of result: NA

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state application for writ of habeas corpus that you may have filed.

☒ Yes ☐ No

11. If your answer to 10 is "Yes," give the following information:

Name of court: 208th District Court of Harris County, Texas

Nature of proceeding: Application for Writ of Habeas Corpus 11.07

Cause number (if known): 917687-A, Writ NO. WR-56,964-02

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

June 12, 2003

Grounds raised: Ineffective Assistance of Counsel and Court's

Failure to Follow Procedures concerning Motions Filed Pro se

Date of final decision: October 15, 2003

Name of court that issued the final decision: Court of Criminal Appeals Texas

As to any second petition, application or motion, give the same information:

Name of court: 208th District Court of Harris County, Texas

Nature of proceeding: Application for Writ of Habeas Corpus 11.07

Cause No. 917687-B, Writ No. WR-56,964-04

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court.

January 13, 2005

Grounds raised: Ineffective Assistance of Counsel, Trial Court

Abuse of Discretion, Failure to Provide Due Process and

Ineffective Assistance of Counsel of Appellate Counsel

Date of final decision: August 22, 2005

Name of court that issued the final decision: Court of Criminal Appeals Texas

If you have filed more than two petitions, applications, or motions, please attach an additional sheet of paper and give the same information about each petition, application, or motion.

SEE ATTACHED PAPERS FOR ADDITIONAL APPLICATIONS FILED

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition?

☒ Yes ☐ No

- (a) If your answer is "yes," give the name and location of the court that imposed the sentence to be served in the future:

208th District Court of Harris County, Texas

- (b) Give the date and length of the sentence to be served in the future: LIFE

Consecutive to first sentence

- (c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future?

☒ Yes ☐ No

Parole Revocation:

13. Date and location of your parole revocation: _____
14. Have you filed any petitions, applications, or motions in any state or federal court challenging your parole revocation?
- ☐ Yes ☐ No

If your answer is "yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings:

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? ☐ Yes ☐ No
16. Are you eligible for mandatory supervised release? ☐ Yes ☐ No
17. Name and location of prison or TDCJ Unit that found you guilty of the disciplinary violation:

Disciplinary case number: _____

18. Date you were found guilty of the disciplinary violation: _____
- Did you lose previously earned good-time credits? ☐ Yes ☐ No

Identify all punishment imposed, including the length of any punishment if applicable, any changes in custody status, and the number of earned good-time credits lost: _____

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure?
- ☐ Yes ☐ No

If your answer to Question 19 is "yes," answer the following:

Step 1 Result: _____

Date of Result: _____

Step 2 Result: _____

Date of Result: _____

All applicants must answer the remaining questions:

20. State clearly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION:

Exhaustion of State Remedies: You must ordinarily present your arguments to the highest state court as to each ground before you can proceed in federal court.

Subsequent Petitions: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

Following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement is a separate ground for possible relief. You may raise any grounds, even if not listed below, if you have exhausted your state court remedies. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your belief that you are being held unlawfully.

DO NOT JUST CHECK ONE OR MORE OF THE LISTED GROUNDS. Instead, you must also STATE the SUPPORTING FACTS for ANY ground you rely upon as the basis for your petition.

- (a) Conviction obtained by a plea of guilty which was unlawfully induced, or not made voluntarily, or made without an understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by the use of a coerced confession.
- (c) Conviction obtained by the use of evidence gained from an unconstitutional search and seizure.
- (d) Conviction obtained by the use of evidence obtained from an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the prosecution's failure to tell the defendant about evidence favorable to the defendant.
- (g) Conviction obtained by the action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (h) Conviction obtained by a violation of the protection against double jeopardy.
- (i) Denial of effective assistance of counsel.
- (j) Denial of the right to appeal.
- (k) Violation of my right to due process in a disciplinary action taken by prison officials.

A. **GROUND ONE:** Ineffective Assistance of Counsel

Trial Counsel

Supporting FACTS (tell your story briefly without citing cases or law):

Counsel failed to thoroughly investigate the case. Counsel
gave erroneous and misleading advice on Clear point's of Law
Counsel never consulted with me before trial about any defense
Counsel gave false statements on his sworn Affidavit clearly
demonstrating his animosity toward his representation of me.

B. **GROUND TWO:** Trial Court's Abuse of Discretion, Failure to
Provide DUE PROCESS

Supporting FACTS (tell your story briefly without citing cases or law):

On April 7, 2003 a Motion to Dismiss and Replace Court
Appointed Counsel was sent to the District Clerk of Harris
County, No action was taken no inquiry was made. Numerous
Pro se Motions have been filed the results have been the same
either no action taken or no response at all.

C. **GROUND THREE:** Trial Court's Abuse of Discretion, Judge's
Qualification to Hear Case

Supporting FACTS (tell your story briefly without citing cases or law):

The Judge conducted meetings with the Complaint Witness before
Trial began. The Issues of Recusal, bias and prejudice have
been raised. If a hearing into this ever took place I was
never informed. I was denied DUE PROCESS the first time I was
taken before this Court for bail I was without Counsel

D. **GROUND FOUR:** Ineffective Assistance of Counsel, Appellate
Counsel

Supporting FACTS (tell your story briefly without citing cases or law):

This Ground was granted in regards to depriveal of opporton-
ity to file a Petition for Discretionary Review. But there
is the other issues that have not been answered. The failure
to present significant and obvious issues on Direct Appeal.
Counsel failure to amend appeal when informed of this.

21. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation, or disciplinary proceeding that you are attacking in this petition?

☐ Yes ☒ No

If your answer is "yes," give the date on which each petition was filed, the federal court in which it was filed, and whether the petition was (a) dismissed without prejudice or (b) denied.

22. Are any of the grounds listed in paragraph 20 above presented for the first time in this petition?

☒ Yes ☐ No

If your answer is "yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

The Ineffective Assistance of Appellate Counsel is not new
but his additional failure to present significant issues is.
These issues have been procedurally barred in the lower courts.

23. Do you have any habeas corpus proceedings or appeals now pending in any court, either state or federal, relating to the judgment or proceeding under attack?

☐

Yes

☒

No

If "yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on January 21, 2009 (month, date, year).

Executed on January 20, 2009 (date).

Wesley Earl Massoth
Signature of Petitioner (required)

Petitioner's current address: WESLEY EARL MASSOTH TDCJ# 1176823

James V. Allred Unit 2101 FM 369 N.

Iowa Park, TX 76367

ADDITIONAL ANSWERS TO QUESTION 11.

As to any third petition, application or motion, give the same information:

Name of court: Fourteenth Court of Appeals

Nature of proceeding: Appellant's pro se Petition for Discretionary Review

Cause Number 14-03-00606-CR

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court:
August 22, 2005

Grounds raised: Ineffective Assistance of Counsel

Date of final decision: January 25, 2006

Name of court that issued the final decision: Court of Criminal Appeals of Texas

As to any forth petition, application or motion, give the same information:

Name of court: 208th District Court of Harris County, Texas

Nature of proceeding: Application for Writ of Habeas Corpus 11.07

Cause Number: 917687-C, Writ NO. WR-56,964-06

Date (month, day and year) you filed the petition, application or motion as shown by a filed-stamped date from the particular court:
March 21, 2006

Date of final decision: October 22, 2008

Name of court that issued the final decision: Court of Criminal Appeals of Texas

ADDITIONAL ANSWERS TO QUESTION 20.

E. GROUND FIVE: Imposition of Consecutive Life Sentences

Under 3.03(b)(2)(A)

Supporting Facts:

Consecutive life sentences imposed by the court guarantee that Petitioner will never be released from prison since parole will not be considered until he is one hundred and two years of age. Petitioner was sentenced on the basis of the exception Tex., Penal Code Ann. §3.03(b)(2)(A).

F. GROUND SIX: Violation of Fourteenth and Sixth Amendments to the CONSTITUTION under APPRENDI V. NEW JERSEY

Supporting Facts:

The Judge stacked the sentences. I was never tried for one of these cases. This was the first time in my life that I have ever been arrested for anything. I was denied Due Process and the Sixth Amendment right to trial by jury in this second case that was not proven before one.

January 20, 2009

Clerk of the U.S. District Court
Southern District of Texas
P.O. Box 61010
Houston, Texas 77208

RE: Two Petitions for Writ of Habeas Corpus by a Person in
State Custody.
Cause NO(s). 917686 and 917687 in the 208th District Court
of Harris County, Texas.

Dear Clerk of the Court:

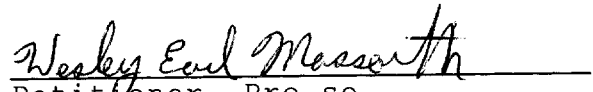
Contained herein are three copies with each individually
signed by myself the Petitioner. Treat anyones you wish as the
originals. This Unit does not provide a copying service and this
was the only way to provide the necessary copies needed.

There is a self-addressed envelope to send my filing fee
receipt and proof of filing date as well as the U.S. District
Court Case Number assigned to these cases. I have sent the
filing fees (\$10.00) through the TDCJ Trust Fund System and
this should be arriving shortly if not already.

However, with these Petitions I have sent a Application
to Proceed In Forma Pauperis for any future costs. This I do
because my funds are limited by what my family is able to send
me.

Thank you for assistance in these matters.

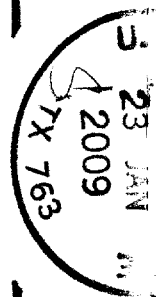
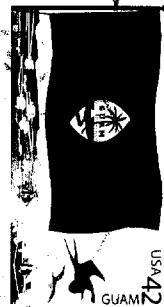
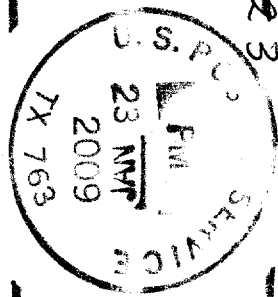
Sincerely,


Petitioner, Pro se
WESLEY EARL MASSOTH
TDCJ #1176823
James V. Allred Unit
2101 FM 369 N.
Iowa Park, TX 76367

Note 1; There attached pages to each petition for answers to
questions 11 and 20.

Note 2; Brief in support of petitions well follow within 30 days
of confirmation of acceptance of petitions.

Wesley E. Massoth #176823
Stephan U. Alledroit
2161 FM 369N
Atmore Park, TX 76367



United States District Court
Southern District of Texas
FILED

JAN 26 2009

Jeffrey M. Wilby, Clerk

Clerk of the U.S.D.
Southern District of
P.O. Box 61010
Houston, Texas 772